No. 03-1395

In the Supreme Court of the United States

GEORGE J. TENET, INDIVIDUALLY, PORTER J. GOSS, DIRECTOR OF CENTRAL INTELLIGENCE AND DIRECTOR OF THE CENTRAL INTELLIGENCE AGENCY, AND UNITED STATES OF AMERICA, PETITIONERS

v.

JOHN DOE AND JANE DOE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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Respondents do not and cannot dispute that their suit in its entirety is premised on, and presupposes, the existence of an espionage agreement with the CIA. Respondents accordingly offer no explanation of how they can recover on *any* of their claims without being able to prove and obtain a judicial order that, in fact, respondents were espionage agents for the CIA and that respondents had entered into an agreement under which the CIA promised lifetime financial assistance and certain assurances of fair process in exchange for their espionage services. But inherent in any espionage agreement is that the agreement will remain forever secret and that the employing sovereign may deny the agreement and any association with the agent. Such principles render the agreement extra-legal and therefore unenforceable in any court.

Those principles, which form the foundation of the Court's decision in *Totten* v. *United States*, 92 U.S. 105 (1876), re-

main necessary to safeguard our national security and promote effective foreign relations. The *Totten* doctrine does not, as respondents suggest, rely on any unreviewable executive determination, but rather requires the courts to dismiss claims, either sua sponte or on the government's motion, that by their nature presuppose a classified fact—the existence or details of a secret espionage agreement. Respondents' suit is just such an action. The suit is incompatible with the nature of their purported agreement with the CIA and the historical and routine practice of the United States to refuse to confirm or deny the existence of such agreements. Respondents' suit is thus barred by *Totten*.

A. *Totten* Applies To All Of Respondents' Claims

Respondents argue that *Totten*'s categorical bar to suits by espionage agents seeking compensation for past services does not govern this suit because respondents have not brought a breach of contract claim for money damages as did the alleged spy in *Totten*. But, while respondents emphasize their claims to force the CIA to provide an enhanced internal process, they also seek monetary relief pursuant to an estoppel theory. Respondents' estoppel claims are indistinguishable from the claims in *Totten*. Moreover, their due process claims are also controlled by *Totten* because they are premised on the existence of a secret espionage agreement and seek to enforce assurances they claim the CIA made about its internal process.

1. Totten *bars respondents' estoppel claim*

Respondents' estoppel claim for monetary relief is in all material respects identical to the breach of contract claim brought by the alleged spy in *Totten*, who sought promised compensation for espionage services during the Civil War. Here, respondents seek monetary relief based on the CIA's alleged promises of assistance in exchange for espionage services during the Cold War. Respondents acknowledge

that "[t]heir request does include financial assistance." Br. 16. Indeed, their complaint demands a specific monetary award based on levels of financial support that they allege were previously provided by the CIA. Pet. App. 138a; see also Br. in Opp. App. 4-5 (Affidavit of John Doe) (alleging specific levels and types of financial support and benefits given by the CIA). Such claims for relief cannot be sustained without proof that an agreement to provide compensation for espionage services existed and that the CIA made enforceable promises with respect to the levels and length of compensation. See, *e.g. Cyberchron Corp.* v. *Calldata Sys. Dev., Inc.*, 47 F.3d 39, 43 (2d Cir. 1995) ("the first element of promissory estoppel is a clear and unambiguous promise"); accord *Aguilar* v. *International Longshoremen's Union Local # 10*, 966 F.2d 443, 445-446 (9th Cir. 1992).

Whether framed as estoppel or a claim for a breach of contract, *Totten* forecloses any request for monetary relief that is based on the government's alleged promise to pay for espionage services. The Court in *Totten* held that every espionage agreement implicitly includes a term that the spy may never seek to enforce the terms of that agreement against the United States in "*any* suit in a court of justice." 92 U.S. at 107 (emphasis added). *Totten* reasoned that adjudication of such claims by former spies would conflict with the parties' implicit agreement to keep the entire matter secret "for ever" and would necessarily disclose whether a secret agreement existed and the details of that agreement. *Id.* at 106-107. *Totten* also recognized the practical reality that the United States cannot conduct successful espionage activities and maintain effective foreign relations if alleged spies were permitted to prove (and thereby publicly disclose) that the United States had employed them to steal secrets from the enemy. *Ibid.*

The Court's reasoning in *Totten* is confirmed by the secrecy that has historically surrounded espionage relationships in this country, and the international acceptance around the globe that a country need not, and traditionally does not, acknowledge its employment of spies. Thus, since our Nation's inception, espionage relationships have, by necessity and by their nature, been treated as secret in order to protect the overarching national security and foreign policy interests of the United States. That secrecy prevents respondents from seeking a judicial order awarding monetary relief for alleged past espionage services. U.S. Br. 11-21.

2. Totten *bars respondents' due process claims*

Respondents also argue that *Totten* does not bar their claim that the Due Process Clause entitles them to a judicial order compelling the CIA to adopt and apply fair internal procedures for resolving compensation grievances by alleged former spies. Br. 16, 29-30. But that request for relief is, if anything, more objectionable than the request for monetary relief at issue in *Totten*. Respondents' "process" claims either require specific performance of the promises the CIA allegedly made to them about procedural protections or would involve the judiciary in determining what procedures the CIA must employ to resolve complaints of unacknowledged espionage agents who are dissatisfied with the level or extent of money paid to them for past spy services conducted overseas. Such a suit invites courts to second-guess the CIA's tradecraft methods in recruiting, maintaining, compensating, and terminating spies and would chill CIA case officers from conducting effective espionage operations. The suit accordingly would significantly intrude into the Executive Branch's constitutionally entrusted role in employing spies to protect national security and in making judgments about what promises and internal procedures are

necessary to induce cooperation from an optimal number of human intelligence sources abroad. U.S. Br. 22-25.

Respondents' constitutional claim, like respondents' estoppel claim, also is premised on a secret fact or facts, *i.e.* the existence of an espionage relationship and perhaps the procedures or standards agreed upon to govern that relationship. Respondents' ability to obtain a court order modifying the CIA's internal procedures for handling complaints depends on either specific "assurances" that such procedures would be available (Resp. Br. 32) or, at a minimum, on the existence of a secret espionage relationship that would give respondents a basis to complain about the lack of appropriate procedures. In either event, respondents' process claims depend on the existence or details of a secret espionage agreement. As the Ninth Circuit twice observed, in order to establish any entitlement to procedural due process, respondents *must* prove, and a court *must* determine, that respondents in fact spied for the United States. Pet. App. 37a (requiring district court to engage in an "evidentiary inquiry * * * to determine whether the alleged relationship with the CIA in fact existed and, if so, whether the resulting relationship gave rise to a legally cognizable property or liberty interest."); accord *id.* at 35a ("to make out their procedural due process claim, [respondents] will need to demonstrate * * * that they had a relationship with the CIA that could potentially establish an entitlement to continued assistance of payments"). Respondents have not contended otherwise.

The Court in *Totten* specifically held that spies "must look for their compensation to the contingent fund of the department employing them, and to such allowances from it as those who dispense that fund may award," and that "[t]he secrecy which such contracts impose precludes any action for their enforcement." 92 U.S. at 107. After *Totten*, these limitations must be regarded as inhering in every agreement

to perform espionage, and the payment of compensation and the procedures for dispensing such payments from the contingent fund accordingly must be viewed as matters traditionally committed to agency discretion by law. See *e.g.*, *Lincoln* v. *Vigil*, 508 U.S. 182, 191-193 (1993). The existence of internal procedures to assist the Agency in evaluating compensation claims does not affect the basic discretionary nature of the determination or confer private, or judicially enforceable rights on spies.

The paramount considerations underlying *Totten*, accordingly, refute any claimed expectation on the part of respondents that their alleged agreement with the CIA would give rise to any legally enforceable rights or that respondents could pursue in court their alleged displeasure with the CIA's internal procedures for processing compensation claims by former spies. In short, the secrecy inherent in, and vital to, any espionage agreement forecloses any judicial adjudication of respondents' constitutional claims for "fair" procedures because those claims are necessarily premised on, and completely inconsistent with, the existence of an alleged secret agreement. U.S. Br. 13-21.

Respondents fail in their attempt to distinguish themselves from espionage agents who, under international law, have no recognized legal position or means of redress against the government employing them. Respondents observe that they were not "captured abroad" and are now "United States citizens residing in the United States." Br. 33 n.17. But the alleged spy in *Totten* was presumably a U.S. citizen and not captured and those circumstances did not give rise to legally enforceable rights. Here respondents' claimed rights stem from an allegation that the United States had promised them, then citizens of an enemy of the United States, lifelong benefits in exchange for conducting secret services abroad. Respondents do not dispute that, *had* they been captured abroad, they could have been severely

punished by their country of origin for their alleged activities without legal recourse to United States courts. See Resp. Br. 2 (alleging that their spying has "put[] them at lifelong risk of retaliation, including assassination"); accord Br. in Opp. App. 3 (Affidavit of John Doe). Implicit in all espionage relationships is that either party may refuse to acknowledge the relationship. The secrecy inherent in the relationship thus would have permitted the United States to refuse to confirm or deny any association with respondents. U.S. Br. 18-19. Indeed, that premise presumably would hold true today were respondents to return to their country of origin and their past alleged activities discovered. Cf. Pet. App. 136a (Comp. ¶ 5.21) (alleging that respondents risk being identified in "Eastern Europe" and "subjected to sanctions or blackmail"). The implicit term of the secret relationship that would entitle the United States to refuse to acknowledge the relationship in that dire situation, *a fortiori*, precludes respondents' effort to seek relief in United States courts that is necessarily premised on the same relationship.

Moreover, because respondents' due process claims are premised on the CIA's alleged failure to pay them sufficiently for their purported espionage services (or to provide sufficient process to vindicate their claims for payment), this case is readily distinguishable from the situation hypothesized by respondents in which a person has been physically detained or coerced by the CIA. Br. 31-32 n.14. In those situations, the alleged constitutional injury would not depend on any secret agreement with the CIA.

By contrast, respondents' claims are premised on the existence of an alleged *contract* in which respondents agreed to spy as an explicit *quid pro quo* for the CIA's assistance in bringing respondents to the United States and securing their citizenship and new identities. Thus, respondents allege that they approached "a person known to them to be

attached to the United States embassy and requested assistance in defecting to the United States" because they were "disenchanted with Communism." Br. 2. They further allege that CIA officials responded by stating that the Agency would agree to bring respondents to the United States only on the condition that respondents steal secrets from their country of origin over a period of time. Br. 2-3. Although respondents may have believed that "they had no real choice" (Br. 2) but to agree to perform espionage services in exchange for the CIA's assistance, respondents are merely describing the alleged terms of the CIA's offer, and the alleged bargain ultimately struck with the CIA. As the court of appeals explained, respondents allege that "although they were initially reluctant to conduct espionage activities, they eventually *agreed* to do what was *asked* of them. They allege that they carried out their *end of the bargain* but that the Agency has now reneged and abandoned them to fend for themselves." Pet. App. 3a (emphases added); see Br. in Opp. App. 2-3 (Affidavit of John Doe) (alleging that CIA agents had Agency approval "of the *offers* being made to us" and that "in reliance on the Agency's *promises* of assistance, we reluctantly *agreed* to work 'in place' for the United States conducting espionage activities") (emphases added); *Id.* at 3 ("After carrying out *our end of the bargain* at great personal risk for the requisite period, we requested that the Agency arrange for our defection and travel to the United States.") (emphasis added).

3. Webster *v.* Doe *does not require the CIA to answer respondents' due process claims*

Respondents also rely on *Webster* v. *Doe*, 486 U.S. 592 (1988), in arguing that *Totten* does not apply to their due process claims. Br. 36-38. *Webster*, however, did not involve an assertion that *Totten* required dismissal of the action, and the case did not involve alleged espionage agents who

claimed that the CIA's failure to compensate them gave rise to legally enforceable rights. Rather, *Webster* rejected an alternative threshold argument in favor of dismissal and held that an *acknowledged employee* of the CIA may bring colorable constitutional challenges to his termination from the Agency. *Id.* at 604-605. The Executive Branch did not invoke a *Totten* defense in *Webster*, and the rights of acknowledged employees raise quite different considerations from claims brought by those with no acknowledged relationship with the CIA. When there is an acknowledged employment relationship, claims invoking legal limits on how such relationship may be terminated do not depend on a classified fact, although the adjudication of such claim *may* implicate evidence protected by the state secrets privilege. The situation is quite different when the very fact of the relationship is secret. *Totten* involved the latter situation and respected the interest of the Executive Branch in not responding to or even acknowledging such claims. There is no basis for this Court to revisit *Totten* or the Executive Branch's consistent judgment throughout our history that the existence of an espionage relationship is classified and must remain secret. U.S. Br. 11-17.

The historical treatment of espionage agents also distinguishes respondents' suit from actions by acknowledged CIA employees, including those engaged in clandestine activities. Thus, in recognizing an employee's ability to bring constitutional claims against the Agency, the Court in *Webster* relied in significant part on the CIA's historical practice of litigating employment disputes under Title VII concerning the hiring and promotion policies of Agency employees. 486 U.S. at 604. We are aware of no post-*Totten* decision (and respondents cite none) that has permitted an alleged espionage agent to seek redress for the United States' failure to compensate the agent for overseas activities in stealing military

secrets from an enemy of the United States. Such a proceeding would be unprecedented.

B. Application of *Totten* To Respondents' Suit Does Not Violate Separation Of Powers Principles

Respondents also argue that applying *Totten* in this case would undermine the judiciary's role in safeguarding citizens' rights and ensuring that the Executive Branch is correct in asserting that state secrets would be divulged in any given case. Br. 18-23, 30-31. Respondents thus assert that the Court must insist upon the formal assertion and establishment of the state secrets privilege under *United States* v. *Reynolds*, 345 U.S. 1 (1953), rather than defer to "nothing more than the statement of a mid-level official" from the CIA that respondents' suit "involve[s] an espionage or secret relationship." Br. 31-32 n.14. Those arguments reflect a fundamental misunderstanding of the judicial role under both *Totten* and *Reynolds*.

The principles underlying *Totten* are fully consistent with the role of the judiciary in safeguarding the rights of citizens. It is, after all, the court, not the Executive in some act of unreviewable discretion, that must determine whether any given case is properly governed by *Totten*. That determination turns on whether the complaint on its face is premised on an alleged espionage agreement. *Reynolds*, 345 U.S. at 11 n.26. Here, that point is not open to serious dispute. The district court and the court of appeals thus should have ordered the complaint dismissed under *Totten*. Those courts erred not in failing to defer automatically to the Executive's invocation of *Totten*, but in failing to abide by this Court's binding precedent in *Totten*, which does not leave open to a district court the option of proceeding when *Totten* makes clear that the very nature of the suit carries with it unacceptable risks of the disclosure of classified information and therefore that the suit must be dismissed.

Respondents also seem to ignore that *Reynolds* involves, if anything, greater deference to Executive Branch judgments that information is classified. Once the Executive determines that certain information implicates state secrets, that information must be excluded. *Totten* involves the distinct question of whether the plaintiffs' claims necessarily implicate a secret espionage agreement. That is a question for the judiciary, but one that, in this case, admits of only one answer.

Application of *Totten* certainly involves no diminishment of the judicial role. Compensation disputes between alleged former spies and the CIA have *never* been the subject of judicial adjudication, and the Executive Branch throughout the Nation's history has compensated its spies in complete secrecy. U.S. Br. 22. Adjudication of respondents' suit, which seeks a specific award of compensation and an order detailing what internal procedures the CIA must employ for spy-compensation disputes, Pet. App. 138a-141a, would reflect an unprecedented reworking of the separation of powers. As the Court in *Totten* explained, 92 U.S. at 107, the extent of any remedy for former spies who are dissatisfied with the CIA's level and manner of compensation is vested in the Executive Branch, which has an obvious incentive to honor its commitments to espionage agents and to adopt fair internal procedures for dealing with their grievances. U.S. Br. 21.

Respondents also seriously err in arguing that the United States' conduct in litigating this case demonstrates the need for the judiciary to superintend how the CIA internally handles grievances by alleged former spies. Br. 38-44. Contrary to respondents' assertion, the United States has correctly and consistently maintained that no law or regulation provides respondents (or any other alleged spy) with a judicially enforceable entitlement to compensation, lifetime or otherwise. Such an entitlement would fly in the face of the Exe-

cutive's history of compensating spies in utter secrecy, and the paramount interest of the United States in conducting its clandestine operations, particularly the manner of recruiting, compensating, and terminating spies, in absolute secrecy.

The United States also has not, contrary to respondents' contention, misrepresented in these proceedings the significance of "PL-110," which the government accurately explained to the district court refers to 50 U.S.C. 403h. See Resp. Br. 39. Section 403h merely displaces otherwise applicable immigration requirements with respect to persons whose entry into this country the United States has determined will further national security or is essential to the Nation's intelligence mission. 50 U.S.C. 403h. The terms of the statute, however, are silent with respect to spies, much less whether they are owed compensation or a minimal level of Executive Branch process.

Respondents also point to redacted regulations of the CIA, which state that CIA's "financial support for [redacted] should cease as soon as possible" but that the CIA "may" provide support for lengthy periods "if [redacted] determines that such support is necessary." Br. 42 (emphasis omitted). Respondents similarly cite a 1988 letter from the CIA to the Department of Justice concerning persons who enter the country under Section 403h, stating that the CIA "believes it has an obligation to support each of its [redacted] for a reasonable period of time" and that its commitment "may be for life" "based upon unique circumstances." *Ibid.* (emphasis omitted). Those passages in no way represent a legal commitment to provide a specific level of financial support to espionage agents, much less a conferral of private, judicially enforceable rights to obtain any particular level of support. Moreover, even if the Executive decides to make certain procedures available to espionage agents, a claimed spy cannot obtain a judicial declaration that he is entitled to compensation under such procedures without running afoul

of *Totten*. Likewise, it is difficult to imagine what standards judges could apply to assess the adequacy of such internal procedures.

Far from demonstrating the need for judicial intervention in this case, this suit illustrates why respondents' complaint should have been dismissed *at the outset*. The temptation to reveal a little information about Executive Branch procedures in general in order to obtain a dismissal in a particular case will often lead to the disclosure of sensitive information when the entire suit is premised on a secret espionage agreements. Subtle differences in how the Executive Branch responds can provide clues to foreign governments as to whether the allegations have any merit. The far better course is to dismiss such suits at the outset in recognition that the risks of disclosure and the nature of the agreement justify a rule of dismissal.

C. Because Respondents' Suit Cannot Proceed Without Disclosing The Secret Fact Of Whether Respondents Were Espionage Agents, The CIA Need Not Formally Assert And Establish The State Secrets Privilege

1. Reynolds *does not supersede* Totten

Respondents argue that *Reynolds*, *supra*, supplants *Totten*, presumably even on its own facts, because the Court in *Reynolds* cited *Totten* as an example of a "privilege" that protects military secrets. Br. 26-27 (citing *Reynolds*, 345 U.S. at 6-7, 11 n.26). The Court's discussion in another passage of *Reynolds*, however, makes clear that *Totten* continues to impose a *categorical* rule of dismissal with respect to suits alleging compensation claims by espionage agents. Thus, the Court explained that, "where the very subject matter of the action," is "a contract to perform espionage," *i.e.*, "a matter of state secret," *Totten* requires dismissal "*on the pleadings without ever reaching the question of evidence*,

since it [is] so obvious that the action should never prevail over the privilege." 354 U.S. at 11 n.26 (emphasis added).

The above passage establishes that the Court did not contemplate that the CIA would need to assert and establish an evidentiary state secrets privilege when the plaintiff's complaint on its face shows that the suit is premised on an agreement for espionage services. Thus, regardless of whether *Totten* is viewed as a substantive rule that suits based on secret espionage agreements are necessarily barred by the very nature of the undertaking, or as a "privilege" against litigating certain claims, or as a prophylactic rule that protects state secrets, it clearly operates as a jurisdictional bar to complaints "where the very subject matter of the action [is] a contract to perform espionage." 354 U.S. at 11 n.26. Indeed, since *Reynolds*, the Court has explained that *Totten* poses a categorical bar that "'forbids the maintenance of any suit'" to recover on a claim whose essential element is a classified fact that is beyond "judicial scrutiny." *Weinberger* v. *Catholic Action*, 454 U.S. 139, 146 (1981) (quoting *Totten*, 92 U.S. at 107)). No formal assertion of the state secrets privilege is necessary in such instances, because it is clear on the face of the plaintiff's complaint that the suit cannot proceed without forcing the United States to confirm or deny a classified fact. *Id.* at 146-147.

Respondents thus err in arguing that *Reynolds* requires district courts to determine that on a case-by-case basis a suit such as respondents' would jeopardize national security, Br. 12, 14, 25-26, 32-33, and in relying on the conclusion of the district court and the court of appeals that respondents' suit may proceed without necessarily disclosing national security information. *Reynolds* did not free up lower courts to ignore *Totten*. To the contrary, this Court in *Reynolds* reaffirmed *Totten*'s judgment that "public policy forbids the maintenance of any suit in a court of justice" that is premised on an alleged espionage relationship. 92 U.S. at 107. Only by

ignoring the very holding of *Totten* could the court of appeals conclude that respondents' "have so far proceeded in a manner that has not breached" "any secrecy promise implicit in the agreement." Pet. App. 22a.

Respondents are similarly mistaken in suggesting that other courts of appeals have recognized the abrogation of *Totten*. Br. 26-29. The Ninth Circuit stands alone in that respect. The decisions cited by respondents are all inapposite; none of them holds that *Reynolds* supersedes *Totten* in cases governed by *Totten*, and indeed, none involves a suit by an alleged spy.[1]

Respondents also cite decisions in which courts have invoked *Totten* to dismiss suits only after the state secrets privilege has been formally asserted.[2] None of those cases, however, involved a case of the class governed by *Totten*—a

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[1] *Monarch Assurance P.L.C.* v. *United States*, 244 F.3d 1356, 1360 (Fed. Cir. 2001), was a suit by a company seeking to address a breach of promise *by* an alleged spy on behalf of the Agency, and the issue of whether *Totten* would apply in those circumstances was not before the court of appeals since the United States already had validly asserted the state secrets privilege. *Air-Sea Forwarders, Inc.* v. *United States*, 166 F.3d 1170, 1171-1172 (Fed. Cir. 1999), held that a settlement agreement barred a suit by a CIA contractor—an entity whose relationship with the CIA was not secret. The court did not reach the issue whether *Totten*—as opposed to the settlement agreement—barred the suit and accordingly did not consider whether the government was required to assert a state secrets privilege. *Clift* v. *United States*, 597 F.2d 826, 830 (2d Cir. 1979), held that the district court erred in invoking *Totten sua sponte* in a suit by a patentee that did not have any contract (much less a secret one) with the government. Finally, *Farnsworth Cannon, Inc.* v. *Grimes*, 635 F.2d 268, 271 (4th Cir. 1980), rejected a government official's argument that *Totten* required dismissal in a case brought by a government employee where the state secrets privilege had already been asserted before the case reached the court of appeals.

[2] *McDonnell Douglas Corp.* v. *United States*, 323 F.3d 1006, 1021 (Fed. Cir. 2003); *Kasza* v. *Browner*, 133 F.3d 1159, 1166, 1170 (9th Cir.), cert. denied, 525 U.S. 967 (1998); *Zuckerbraun* v. *General Dynamics Corp.*, 935 F.2d 544, 547-548 (2d Cir. 1991); *Fitzgerald* v. *Penthouse Int'l, Ltd.*, 776 F.2d 1236, 1241-1242 (4th Cir. 1985).

suit by an alleged spy seeking redress for the government's failure to compensate the spy—and none of the decisions presented the question of whether, in that class of cases, *Totten* compels the dismissal of the complaint.

2. Reynolds *does not adequately protect the CIA's interests in keeping espionage agreements secret*

As discussed, because adjudication of respondents' suit necessarily would be based on the existence of a secret agreement and would entail adjudication of the classified fact of whether respondents were spies, there is no basis for requiring the CIA to assert the state secrets privilege on a case-by-case and evidence-by-evidence basis. Such a regime not only would be entirely unnecessary; it would also pose significant and unjustified costs on the Director of Central Intelligence and seriously increase the risk of disclosure of classified information as well as "graymail" payments by the Agency in order to prevent suits by spies with perceived grievances against the CIA. U.S. Br. 32-34.

Respondents also err in arguing that their suit poses no danger to national security because they have proceeded by using pseudonyms without disclosing their identities or the details of their alleged activities overseas. Br. 17, 29. The objection to the suit in *Totten* extended well beyond the revelation of William Lloyd's name and his allegation that he spied for President Lincoln during the Civil War. The objection was to the filing of the suit that sought relief that conflicted fundamentally with the very nature of the alleged secret agreement and the government's interest in conducting espionage operations. 92 U.S. at 106-107.

Respondents also argue that "it is uncontested that [respondents'] complaint and other public filings allege no classified facts" because the CIA has reviewed respondents' pleadings before they were filed. Br. 12; see also Br. 1, 28, 30. The CIA has conducted a pre-filing review, however,

merely to ensure that respondents' counsel, to whom the CIA has granted a limited security approval and has granted access to classified information, do not file documents in open court that make "allegations that, regardless of their truth, would threaten the national security or the safety and well-being of innocent persons," such as the naming of "a specific individual to be a CIA officer." Pet. App. 146a (Declaration of William H. McNair, Information Review Officer for Directorate of Operations).

The CIA's review, however, does not confirm the truth of respondents' allegations. Nor does it change the fact that forcing the Agency to answer respondents' complaint (or permitting a court to decide the issue) would reveal whether respondents actually had a past espionage relationship with the CIA. As set forth in the opening brief, any confirmation or denial of respondents' allegations by the CIA is classified because the Agency's response would reveal highly sensitive information about the existence and identities of espionage agents as well as the CIA's tradecraft methods in conducting espionage operations. U.S. Br. 34-36. The Court's holding in *Totten*, as recognized in *Reynolds*, confirms that respondents' alleged espionage relationship with the CIA, if confirmed or denied by the CIA, would be a state secret.[3]

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[3] Respondents allege (Br. 3-8, 17, 38-39 & n.24, 43-44), that the CIA has privately acknowledged the existence of a relationship with respondents. But the Agency has never confirmed or denied the truth of respondents' allegations. For instance, respondents quote a letter allegedly from CIA personnel (see Br. 3-4), but that letter on its face does not purport to be from the CIA (see Br. in Opp. App. 16-17). Similarly, respondents assert that their counsel encountered difficulties in dealing with the CIA, see Br. 4-8, 43-44, but those assertions are all based on unconfirmed allegations contained in respondents' complaint or an affidavit prepared by respondents' counsel. See Pet. App. 129a-133a; Br. in Opp. App. 18-23. It would be ironic, indeed, were respondents' mere allegations that the CIA has acknowledged an espionage agreement with respondents to furnish a basis for compelling the CIA to publicly confirm or deny those allegations.

Respondents also are fundamentally mistaken in assuming that their suit could be fully adjudicated without the public disclosure of classified information. Br. 17, 30. The only way that respondents could prevail on their claims is to have a completely *sealed* trial in which respondents would prove that they were spies and that the CIA made enforceable promises to them. The proceeding would then presumably result in a *sealed* judgment that awarded respondents a specific level of compensation and that ordered classified procedures for the CIA to follow in resolving compensation disputes by espionage agents.

In the first place, the very fact that respondents must contemplate such extraordinary proceedings to maintain the confidentiality of classified information only underscores that their claims are premised on a secret agreement and a classified fact and that their case cannot proceed without some disclosure—even if only to court personnel or a finder of fact—of classified information. Of course, the same arrangements could have been made in *Totten*, but this Court adopted a rule of dismissal, not the option of wholly closed, secret proceedings.

Moreover, respondents' argument proceeds on a fundamental misunderstanding of the balance that is struck by *Totten* and *Reynolds* in the context of civil litigation. Respondents do not dispute that *Reynolds* mandates outright dismissal—not wholly closed proceedings—of even constitutional claims if the case cannot proceed on the merits without the classified information. *Reynolds*, 345 U.S. at 11; U.S. Br. 42 & n.4. Thus, the effect of the state secrets privilege "is completely to remove the evidence from the case. * * * [T]he evidence is simply disregarded." *In re United States*, 872 F.2d 472, 476 (D.C. Cir.), cert. denied, 493 U.S. 960 (1989). In other words, both *Totten* and *Reynolds* proceed on the assumption that the proper response to classified information in civil litigation is to disregard the classified

information, not to order its partial disclosure to court personnel and/or the finder of fact and closure of the proceedings to prevent *further disclosure*. Here, as discussed, at 13-15, *supra*, there is no basis for requiring the United States formally to assert the state secrets privilege because the complaint demonstrates that respondents cannot prevail on their claims without proof of an espionage agreement and the details of that agreement. In cases like this and *Totten*, because "it [is] so obvious that the action" cannot proceed without the use of a secret fact, *Reynolds*, 345 U.S. at 11 n.26, the suit simply must be dismissed.

* * * * *

For the foregoing reasons and those stated in the opening brief, the judgment of the court of appeals should be reversed, and the case remanded with instructions to dismiss the complaint.

Respectfully submitted.

PAUL D. CLEMENT
Acting Solicitor General

DECEMBER 2004